In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1201

JOSEPH JAVAD MIZANI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the trial court's questioning of his co-defendant deprived him of a fair trial and that the prosecutor's closing argument was improper.

After a jury trial in the United States District Court for the Eastern District of Virginia, petitioner and co-defendant Sternweiler were convicted of distributing about five grams of cocaine, in violation of 21 U.S.C. 841(a)(1). Petitioner was sentenced to a term of imprisonment for five years to be followed by a special parole term of three years. The court of appeals affirmed (Pet. App. 12-15).

On October 17, 1973, federal narcotics agent King was introduced under an assumed name to petitioner and Sternweiler at petitioner's apartment in Bethesda, Maryland.

King was posing as a narcotics buyer from New York City who wanted to get a Washington "connection" for the purchase of cocaine (Tr. 3-5).[1] They talked for about an hour about prices, quality, and quantities, King saying he wanted to buy in five to ten pound lots. Petitioner promised to get a sample and said that he had a connection in Lebanon for hashish oil, who could make them all rich. Petitioner told King to call him on October 22, when he expected to have word on a large shipment of cocaine (Tr. 5-8).

After various telephone calls between King and the two defendants, King met them in a restaurant at National Airport on November 4. Petitioner said he was ready to move ten pounds of cocaine and produced a sample priced at $350, for which he agreed to accept later payment. King had the sample tested and reported to petitioner that the quality was poor. On the following day, petitioner told King that another load was coming in and said he would submit another sample. On November 20, in another meeting at National Airport, King advised that he would not pay for the first sample, saying that it was of poor quality and had all been consumed in the testing process (Tr. 12-23).

On December 19, King met petitioner at National Airport and paid him for the first sample. They had further conversations about deliveries, but none materialized (Tr. 24-28). Surveilling agents corroborated the meetings of King and petitioner (Tr. 61-75).

1. The court's examination of co-defendant Sternweiler was not improper. Testifying in her own defense, Sternweiler had stated on direct examination that she became acquainted with King socially at petitioner's apartment, that King, whom she knew only as "Jackie," had asked her to get him a quarter-ounce of cocaine for his own personal use, that she had obtained the cocaine from another woman

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[1] "Tr." refers to the transcript of testimony at trial. "P. Tr." refers to transcripts of the opening and closing portions of the trial.

for $300, and that thereafter she and petitioner delivered it to King at National Airport, the latter promising to pay for it later (Tr. 95-107). The court questioned Sternweiler about these events, as indicated on the margin.[2]

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[2]The portions of the interrogation that we understand to be in question are as follows (Tr. 160-163):

THE COURT: Why would you think a man from New York would have to come to Washington for whatever ounce it was of cocaine?

THE WITNESS: Because, as I mentioned previously, when I first met him was on a casual basis. And the impression he gave me was that he wanted a small amount of coke for himself. When he called back, then is when he started mentioning about his people in New York City putting—

THE COURT: (Interposing) But I want to know first, when you say he wanted you to get him a quarter of an ounce and he wanted it for himself, that is when he was here in Washington that day when he wanted coke, or Chevy Chase?

THE WITNESS: Right.

THE COURT: Do you know that if a person wants cocaine they don't want it next week, they want it then? Do you know enough about cocaine to know that?

MR. MURRAY: Objection, Your Honor.

THE COURT: Objection overruled.

MR. MURRAY: I don't believe that it is a fact, Your Honor.

THE COURT: I want her to explain that to the jury.

THE WITNESS: I didn't understand exactly what you just asked me.

THE COURT: You used the word "coke", "rip off" and several other phrases.

THE WITNESS: Um-hum.

THE COURT: I just want to know from whatever experience you have had or knowledge, do you know that just a quarter of an ounce, that he wants it then, not six weeks later.

THE WITNESS: Well, I know that when somebody wants something and when they can't get it instantly, that they are going to keep trying for a few days. I mean it is usually impossible that if somebody – this is just from my experience on the campus. When somebody wants it, they are not going to get it like that. (Snapping fingers.)

When the portions of the colloquy selected by petitioner (Pet. 6-7) are placed in full context, it is evident that the court was striving to find out why Sternweiler would be willing to go to such lengths to accommodate an individual she had just met in procuring illicit drugs for his own personal use. In so doing the court did not act as a prosecutor, as petitioner contends. A federal trial judge is not a mere moderator, but may, by timely intervention, elicit testimony from witnesses necessary to clarify the truth.

THE COURT: Did you have any experience with anybody before coming down from New York to ask a strange girl that they had never seen before to get them cocaine?

THE WITNESS: No. I never had experience like that.

THE COURT: It doesn't seem a bit strange to you?

THE WITNESS: He was introduced to us by a friend of ours.

THE COURT: I accept that. But people don't usually come down from New York and ask you to do things, do they?

THE WITNESS: No, not usually. But the impression I got was he was visiting here in Washington. And when he came over and he asked me, "Do you have any coke" —

THE COURT: (Interposing) Can you tell the jury why he picked you out of all the girls in Washington to do this?

THE WITNESS: No. I don't know.

MR. MURRAY: I object. It's a conclusion. It's argumentative, number two.

THE WITNESS: I don't know. Maybe he liked me. I don't know.

THE COURT: Can you tell the jury why you didn't ask him for the money, if you were to get it, instead of you personally furnishing your money? Why didn't you ask him for the money?

THE WITNESS: At that time he said he would take the coke back to his people in New York so they could sample it, and if they didn't think it was good enough, he would bring it back to me.

See, *e.g.*, *Quercia* v. *United States*, 289 U.S. 466, 469; *United States* v. *Hill*, 496 F.2d 201, 202 (C.A. 5).[3]

2. Petitioner's claim of impropriety in the government's summation (Pet. 4-5, 9-10) is without basis. Citing no specific portion of the record, petitioner apparently alludes to the following statements of the prosecutor, made without objection in answer to Sternweiler's defense of entrapment (P. Tr. 37):

> Agent King did not go to the airport and had not been calling on the phone to talk to a nineteen-year old girl about obtaining a quarter ounce of cocaine. That is ridiculous, members of the jury. I suggest to you most respectfully that whole story is a blatant and I think fairly obvious attempt on Miss Sternweiler's part to help Mr. Mizani. Agent King, the Drug Enforcement Administration, is not involved, I would respectfully suggest, with entering into negotiations with nineteen-year old girls to obtain a quarter ounce of cocaine. That is not what this case is all about. This case is about Mr. Mizani being able and representing to Agent King that he is able to obtain a large quantity of cocaine and delivering a sample of that quantity to Agent King on November 4.

The prosecutor also argued (P. Tr. 43):

> Now, Miss Sternweiler has taken the stand and testified in this case today as, of course, she has the right to do. She has done what is commonly called or what is frequently called at least —she has fallen on the grenade, so to speak, for Mr. Mizani. She has at-

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[3]Petitioner's reliance (Pet. 7) on *United States* v. *Cisneros*, 491 F.2d 1068, 1072-1076 (C.A. 5), is misplaced. There the trial judge had called to the attention of the jury certain actions of the chief defense witness after he left the stand, which had a bearing on his credibility. The trial court had assumed that some of the jurors may not have seen the actions in question and was in effect acting as a prosecutor or a prosecution witness.

> tempted to take all the blame for this entire transaction. There is no way that either defendant can claim or make any defense along the lines that they weren't there or that that exhibit contained in Government's No. 2 is not cocaine.

On rebuttal, the prosecutor argued (P. Tr. 67-68):

> And don't make any mistake about it. It wasn't because Agent King was some sort of hypnotist or hypnotized her at the airport into participating. She participated willingly. I respectfully suggest that she participated for one reason. That reason is sitting right at the table—Mr. Mizani, the man she moved to Washington the day after high school graduation to live with, the man she continued to live with and the man that somehow, members of the jury, and I don't know how, I would suggest to you has persuaded that girl to get up on the stand and try to let him out.

The court sustained petitioner's objection to this argument but denied his motion for mistrial, and petitioner did not request a curative instruction (P. Tr. 68).

The prosecutor's only statement suggesting that petitioner was responsible for his co-defendant's account was thus withdrawn from the jury's consideration, and that statement was not a comment about petitioner's failure to take the stand.[4] In any event, since the evidence of petitioner's guilt was overwhelming, any error was plainly harmless.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1975.

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[4]The court properly instructed the jury a short while later that it could draw no inference from petitioner's failure to take the stand (P. Tr. 85-86).